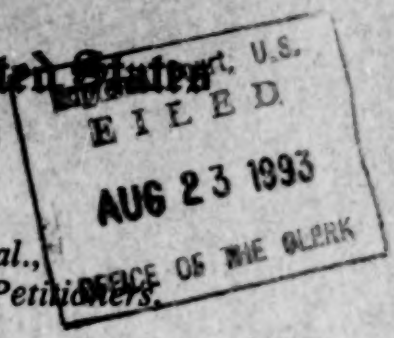
No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993



C&A CARBONE, INC., *et al.*,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF AMICI CURIAE OF CITY OF INDIANAPOLIS, INDIANA, CITY OF TAMPA, FLORIDA, DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT, DELAWARE COUNTY SOLID WASTE AUTHORITY, FAIRFAX COUNTY, VIRGINIA, GREATER DETROIT RESOURCE RECOVERY AUTHORITY, MARION COUNTY, OREGON, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MUNICIPAL WASTE MANAGEMENT ASSOCIATION, REGIONAL WASTE SYSTEMS, INC., RESOURCE AUTHORITY IN SUMNER COUNTY, TENNESSEE, TULSA AUTHORITY FOR RECOVERY OF ENERGY AND CITY OF TULSA, OKLAHOMA, WISCONSIN COUNTY SOLID WASTE MANAGEMENT ASSOCIATION AND YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY IN SUPPORT OF RESPONDENT

SCOTT M. DUBOFF *
JOANNE M. SCANLON
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5704
Counsel for Amici Curiae City of Indianapolis, Indiana, et al.

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SHEILA M. O'BRYAN
Assistant Corporation Counsel
1601 City-County Building
Indianapolis, Indiana 46204
Counsel for City of Indianapolis, Indiana

PAMELA K. AKIN
City Attorney
Old City Hall
315 East Kennedy Blvd.
5th floor
Tampa, Florida 33602
Counsel for City of Tampa, Florida

FELSHAW KING
KING & KING
P.O. Box 320
330 North Main Street
Kaysville, Utah 84037

MARY ANNE WOOD
WOOD SPENDLOVE & QUINN
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Counsel for Davis County Solid Waste Management and Energy Recovery Special Service District

MICHAEL F.X. GILLIN
230 North Monroe Street
Media, Pennsylvania 19063
Counsel for Delaware County Solid Waste Authority

JOHN D. PIRICH
HONIGMAN MILLER SCHWARTZ & COHN
222 Washington Square North
Suite 400
Lansing, Michigan 48933-1800
Counsel for Greater Detroit Resource Recovery Authority

DAVID P. BOBZIEN
County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064
Counsel for Fairfax County, Virginia

ROBERT C. CANNON
Legal Counsel
Marion County
100 High Street, N.E.
Salem, Oregon 97301
Counsel for Marion County, Oregon

NICHOLAS S. NADZO
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
Counsel for Regional Waste Systems, Inc.

DAVID L. PAULING
City Attorney
PATRICK T. BOULDEN
Assistant City Attorney
City Hall Room 316
200 Civic Center
Tulsa, Oklahoma 74103
Counsel for Tulsa Authority for Recovery of Energy and City of Tulsa, Oklahoma

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This brief *amici curiae* is submitted in support of respondent, the Town of Clarkstown, New York. *Amici* have primary responsibility for municipal solid waste (MSW) management in their communities, and waste

II. CLARKSTOWN'S ORDINANCE IS SUBSTANTIALLY SIMILAR TO REGULATIONS ALREADY UPHELD BY THIS COURT AGAINST TAKINGS AND DUE PROCESS CHALLENGES.

This case may be characterized as *California Reduction Company v. Sanitary Reduction Works,* 199 U.S. 306 (1905); and *Gardner v. Michigan,* 199 U.S. 325 (1905), revisited. The two cases were decided by this Court on the same day, November 9, 1905. The ordinances at issue in *California Reduction* and *Gardner* are similar to Clarkstown's in that the regulation in each creates a comprehensive system addressed to the concerns of local government with sanitation upon private premises within the jurisdiction. Each regulation creates some form of exclusive public service and removes the discretion of the householder by mandating delivery of noisome waste to an established system. There are differences. *California Reduction* and *Gardner* measured the scope of the traditional and undelegated police power against the strictures of the takings and due process clauses of the Fifth and Fourteenth Amendment.[4] This Court held that the regulations met the test, as measured, because of the parallel common law duty of the householder to prevent harm by removal of noisome material occurring or created upon private premises, and because of the authority of local government to mandate its public service system for the purpose of carrying out the collective duties of the householders. The regulation thus inserted the mandatory public service system as a mere substitute for the duty of the householder. The rights of the scavenger were likewise seen as being no greater than that of the householder who had the primary duty. This Court significantly stated;

> . . . the municipal authorities might well have doubted whether the substances that were PER SE dangerous or worthless would be separated from such

[4] U.S. Const. Amend. 5 & 14.

> as could be utilized, and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the public safety of the community could not be assured unless the entire mass . . . was carried . . . where it could be promptly destroyed . . . and thus minimize the danger to the public health.

California Reduction, supra, 199 U.S. at 323.

III. FOR THE PURPOSE OF ANALYSIS, THE MSW WASTE INDUSTRY MAY BE DIVIDED INTO DISCRETE SEGMENTS.

The MSW waste industry may be divided into segments which roughly approximate the market as it has developed, including

i) generation;

ii) removal (or collection);

iii) consolidation;

iv) resource recovery for reuse (also referred to as recycling);

v) processing (where waste is treated for use as a resource, or is baled for further transport);

vi) transportation; and

vii) disposal.

Philadelphia v. New Jersey, supra, as measured against the analysis, involved only the latter two segments. This case involves only the first and second. It is important to observe that there are both private and public players in the market, and that the legal principles which determine the rights and relationships of the players in a given case will depend upon the extent of their involvement in one or more of the segments. *Philadelphia v. New Jersey, supra,* did not hold that any public policy created a national market in waste, nor did it hold that any

federal policy mandated any local market in waste, only that waste already in the stream of commerce as a result of market operations could not be made subject to barriers based upon state boundaries. The first segment virtually always involves only local regulation and concern. The second, removal or collection, is local but may be related to an interstate market analysis if the collector is part of that market and receives the waste unrestricted as to its disposition. Consolidation, through use of facilities such as Clarkstown's transfer station, may or may not be strictly local. Separation of recoverable material and processing for reuse or transport will normally be strictly local, as is the case with Carbone's Recyclery in Clarkstown. Transportation and disposal may be strictly local or may involve interstate movements. All of the segments may or may not impact interstate commerce, depending upon ownership, the existence or non-existence of a market, and/or regulation.

IV. CARBONE'S RECYCLING OR RESOURCE RECOVERY OPERATION IS STRICTLY LOCAL AND DOES NOT IMPACT INTERSTATE COMMERCE.

Carbone imports MSW to its Recyclery in Clarkstown where it is combined with similar locally collected waste and used as a source of valuable and marketable materials. As a local owner of a resource recovery facility, Carbone is free under Clarkstown's policy to import or not to import MSW. Undoubtedly, the separation of valuable material from MSW in Clarkstown for resale is a profitable business for Carbone. Clarkstown's policies have strictly local impact upon Carbone, and in fact restrain Carbone only with respect to the useless MSW waste residue which remains from the operation of Carbone's local recycling business. In this respect the useless waste residue is not different in kind from the other local waste which more likely than not will also be partially composed of imported items or by-products.

This Court addressed a similar issue in *Waring v. Mobile,* 8 Wall. (44 U.S.) 110 (1869), except that the issue there involved foreign commerce. The Court's analysis is nevertheless instructive on the issue. There the Court stated:

> When the importer sells the imported articles, or otherwise mixes them with the general property of the state by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

Id. at 122. *Waring* is discussed in *Hipolite Egg Co. v. U.S.,* 220 U.S. 45 (1911), where the Court discusses the contention that (the eggs) "had passed into the general mass of property in the state, and out of the field covered by interstate commerce," *id.* at 55. Here, Carbone, as a business venture, and in order to recover valuable recyclables, has brought a mass of MSW into Clarkstown, admittedly as the terminus of an interstate movement fully protected by the strictures of the Dormant Commerce Clause. But Carbone has voluntarily mixed the MSW with similar locally produced waste. Carbone nevertheless claims protection from local regulations solely because some of the useless residue is the remains from waste which previously moved in interstate commerce. The effect of Carbone's position is that if Carbone cannot show some federally protected right to insist that Clarkstown create an open market in waste removal from private premises in Clarkstown, the New York Court of Appeals' decision should be confirmed. Carbone can show no such right solely on the ground that part of the waste

processed at its recyclery previously moved in interstate commerce. If Carbone can prevail on such an argument, then every householder or operator of every private premises in every jurisdiction may claim the free and unrestricted right (as measured against local regulations) to dispose of virtually all MSW (by interstate movement) wherever they choose, since almost all such material is composed, at least in part, of material which previously moved in interstate commerce.

V. THE MOTIVES OF INDIVIDUAL MEMBERS OF LEGISLATIVE BODIES IN PASSING LAWS ARE NOT USEFUL EXTRINSIC AIDS TO CONSTRUCTION, AND ARE UNIFORMLY DISREGARDED FOR INTERPRETIVE PURPOSES.

Petitioner paints Clarkstown's ordinance as protectionist, at least in part because a witness (Charles Holbrook) ascribed the town's purpose as being to avoid payments under the minimum tonnage guarantee to the contractor. (Petitioner's Brief 5). But such motives are uniformly disregarded. *Sutherland Statutory Construction* § 48.17 (4th Ed.), citing *Aldridge v. Williams,* 3 How (44 U.S.) 9 (1845). "The motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning AND PURPOSE of the law making body." *Duplex Printing Co. v. Deering,* 254 U.S. 443, 474 (1921) (emphasis added). The issue is the validity of the ordinance as applied to the useless residue from Carbone's recyclery. If the ordinance is valid as a local police power regulation of private premises under the harm prevention attributes of the traditional and undelegated police power, it matters not what the motives of the legislators might have been. If the ordinance is not REASONABLY RELATED to the town's legitimate police power interests in preventing the harm which might result from the accumulation of noisome waste upon private premises, no motive can justify it. If it is so related, motive alone cannot defeat it. The fact that the validity

and enforceability of the ordinance secures a "flow" of revenue to support the debt instrument related to the transfer station does not transform Clarkstown from a health and safety regulator and public service provider into either a market participant or market regulator. The transfer station is reasonably related to Clarkstown's objective of systematically removing noisome waste from private premises for consolidation. The mere financing of the transfer station from the revenue stream thus created, does not invalidate Clarktown's regulation.

CONCLUSION

Clarkstown's regulation addresses its legitimate concerns with sanitation on private premises by displacing competition with respect to the removal of waste from private premises and replacing it with a comprehensive public service system. In this respect Clarkstown employs policies already approved by this Court in *California Reduction* and *Gardner,* supra, as measured against the takings and due process clauses. In the absence of a contrary view expressed by Congress, this Court should be reluctant to condemn a traditional comprehensive health and safety waste removal measure, solely because some of the useless waste residue generated upon private premises was derived from waste which was previously the subject of an interstate movement. Carbone's useless waste residue is treated no different under Clarkstown's policies than other similar locally produced material, thus there is no discrimination.[5] Since there is no market or commerce in waste in Clarkstown, its policy should be found to not affect interstate commerce, and that policy should

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[5] As pointed out by the Court, in *Illinois v. General Elec. Co.,* 683 F.2d 206, 214 (CA7 1982), *cert. denied,* 461 U.S. 913, "The hostility is to the thing itself, not to merely interstate shipment of the thing, and an undiscriminating hostility is at least nondiscriminatory."

not be measured by this Court against the strictures of the Dormant Commerce Clause.

Respectfully submitted,

CHARLES H. YOUNGER *
100 Jefferson Street, South
Post Office Box 2795
Huntsville, Alabama 35804
(205) 533-3500
Counsel for Amicus Curiae, The Solid Waste Disposal Authority of The City of Huntsville

* Counsel of Record

APPENDICES

APPENDIX A

ORDINANCE NO. 88-419

BE IT ORDAINED by the City Council of the City of Huntsville, Alabama, as follows:

Section 1. ARTICLE IV (captioned SOLID WASTE) of Chapter 20 of the Code of Ordinances of the City of Huntsville shall be and is hereby amended to read as follows:

"ARTICLE IV. SOLID WASTE

DIVISION 1

DEFINITIONS

Section 20-254. *DEFINITIONS*

The following words, terms and phrases, wherever used in this Article, shall have the meanings delineated in the following definitions unless the context plainly indicates otherwise or that a more restricted or extended meaning is intended.

"*Acceptable Waste*" means that portion of Solid Waste characteristic of that collected or disposed of as part of normal municipal Solid Waste, including, without limitation (a) Garbage, (b) Market Refuse, (c) Rubbish, (d) Ashes, (e) Bulky Waste, (f) Street Refuse, (g)Construction and Demolition Waste, and (h) Industrial Refuse, not including, however, any of the foregoing or other Solid Waste that constitutes Unacceptable Waste or Hazardous Waste; provided however, that if any governmental agency or unit having appropriate jurisdiction shall at any time determine (i) that any substances that were not theretofore Acceptable Waste because they were considered harmful, toxic or dangerous, are not harmful, toxic or dangerous, then such substances shall thereafter be considered Acceptable Waste unless they constitute

Unacceptable Waste or Hazardous Waste, and (ii) that any substances that were theretofore Acceptable Waste are harmful, toxic or dangerous, then such substances shall thereafter not be considered Acceptable Waste.

"Act" means (a) Chapter 89A of Title 11 of the Code of Alabama 1975, as amended, (b) Act No. 80-278 enacted at the 1980 Regular Session of the Legislature of Alabama, as amended, and (c) all acts of said Legislature amendatory thereof or supplemental thereto.

"Actual Acceptance Date" means the date on which the Plant begins accepting for disposal or processing Acceptable Waste from the public generally, which such date shall be deemed to have occurred only if prior to such date there has been published in a newspaper published and having general circulation in the City a notice specifying such date with particularity.

"Agreement" means the Solid Waste and Sewage Sludge Delivery Agreement between the Authority and the City, the proposed text of which is set out in the City's Ordinance No. —— and a signed copy of which will be, on and after October 1, 1988, on file and available for public inspection in the office of the Director of Public Works at the City Hall in the City.

"Approved Receptacle" shall mean a durable, easily cleanable container with tight fitting lids, doors or covers, so as to be leakproof, rodent-proof and insect-proof.

"Ashes" means residue from fires used for cooking and for heating buildings, and cinders.

"Authority" means The Solid Waste Disposal Authority of the City of Huntsville, a public corporation and instrumentality under the laws of the State of Alabama.

"Authorized Disposal Facility" means any of the following:

(a) the Plant,

(b) the Existing Landfill, and

(c) any other facility that constitutes an "Authorized Disposal Facility" within the meaning of the Agreement.

"Authorized Receiving Facility" means any of the following:

(a) the Plant,

(b) the Existing Landfill, and

(c) any other facility that constitutes an "Authorized Receiving Facility" within the meaning of the Agreement.

"Bonds" means the Original Bonds and the Other Indenture-Secured Bonds.

"Bulky Waste" means large auto parts, tires, stoves, refrigerators, other large appliances, furniture, large crates, trees, branches, palm fronds and stumps flotage.

"Business Day" means each Monday, Tuesday, Wednesday, Thursday and Friday that is not a Holiday.

"City" means (a) the City of Huntsville, Alabama, a municipal corporation under the laws of the State of Alabama, its successors and assigns, and (b) when used with reference to a geographic area, means the area within the corporate limits of said City as they exist at the time and does not, any provision of Section 1-8 of this Code to the contrary notwithstanding, include any area outside such corporate limits but within the Police Jurisdiction.

"Construction and Demolition Waste" means lumber roofing and sheathing scraps, rubble, broken concrete, plaster, etc., conduit, pipe, wire, insulation, etc.

"Existing Landfill" means that certain landfill that is located in the City at or near the South end of Leeman Ferry Road and that is now being utilized for the disposal of Acceptable Waste.

Disposal Act, L. 1991, c. 569, authorizes localities in Rockland County, such as the Town of Clarkstown, to require that "all solid waste generated, originated or brought within their respective boundaries . . . shall be delivered to a specified solid waste management resource recovery facility" including a transfer station.

Rockland County has developed a comprehensive solid waste management plan that includes the implementation of a source-separation program for various recyclables, and the development of composting facilities, materials recovery facilities, and an environmentally-sound landfill. The Clarkstown transfer facility plays an integral role in the operation of the County Plan.

C. FLOW CONTROL PROMOTES MANY COMPELLING BENEFITS

Taking responsibility for waste recycling, energy recovery, waste reduction, and environmentally-sound waste disposal requires the ability to direct the flow of waste. Absent such control, state and local efforts to ensure safe and efficient waste disposal will fail. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 14 (1989); U.S. Congress, Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste* 275 (1989).

Flow control is not a recent innovation. Ordinances directing garbage to a specific landfill or hauler are at least 90 years old. In 1905 this Court upheld two such ordinances against takings claims as valid exercises of the police power. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306

County); L. 1991, c. 369 (Madison County); L. 1991, c. 540 (Fulton County); L. 1991, c. 631 (certain towns in Westchester County); L. 1992 c. 252 (Tompkins County); L. 1992, c. 350 (Greene County); L. 1992, c. 369 (Sullivan County); L. 1992, c. 391 (Greater Troy Solid Waste Management Authority); L. 1992, c. 567 (Town of Riverhead); L. 1992, c. 629 (Westchester County).

(1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). More recently, when Congress enacted RCRA, it recognized that various states and localities already "require all discarded materials be transported to a particular location" and it made clear that the legislation did not interfere with such flow control ordinances. H.R. Rep. 94-1491 at 34. At least twenty-nine states and territories have now adopted flow control ordinances.[9]

Flow control promotes New York State public policy as expressed in ECL § 27-0106, *supra* at 9, by providing at least eight benefits. First, flow control promotes the twin goals of energy recovery and recycling, two cornerstones of federal and state policy. By requiring all solid waste to be delivered to a central location, towns and their agents can ensure—in the most efficient manner possible—that all materials that can be

[9] *See e.g.*, Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit.7 § 6406 (31) (1991)); District of Columbia (D.C. Code § 6-507); Florida (Fla. Stat. §§ 403.7063; 403.713 (1986 and Supp. 1992)); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. c. 34 P 5-1047); Indiana (Ind. Code §§ 36-9-31-3 & 4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307 (9)); Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-D (West 1989 and Supp. 1991)); Minnesota (Minn. Stat. § 1158.80 (1990 and Supp. 1991)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws, c. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code §§ 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01 (H)(2)); Oregon (Or. Rev. Stat § 268.317 (3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code § 36.58.040, 35.21.120); West Virginia (W. Va. Code S 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)); Virgin Islands (19 V.I.C. § 1570f).

Flow control, of course, does not violate the Sherman Act. *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 425 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985); *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

removed from the solid waste stream for energy recovery or recycling are indeed removed from the waste stream. Monitors divert recyclable material improperly included in the waste stream and deter improper disposal practices.

Second, flow control promotes the related goal of solid waste reduction, "a key strategy in [New York's] solid waste management policy." L. 1988, c. 70, § 2. By imposing volume-based disposal costs reflective of state-of-the-art technology, flow control ordinances encourage citizens and corporations to reduce the amount of waste they produce. *See Agenda for Action* at 34. Additionally, the removal of all materials from the solid waste stream for energy recovery, composting, and recycling reduces, by definition, the volume of solid waste. Less solid waste translates into fewer health and environmental hazards at downstream landfills.

Third, by funnelling all solid waste to a central location, flow control allows localities to thoroughly monitor the solid waste stream to ensure that hazardous and medical wastes are not commingled with solid waste. Commingling is not a hypothetical problem. Tainted solid waste damages a municipality's reputation, making it more difficult and more expensive to dispose of its solid waste, and increases the health and environmental hazards to those communities that surround compost or landfill facilities as well as to those who work at such facilities. Absent flow control, towns could not check the entire waste stream and intercept commingled waste. Flow control provides an efficient and necessary first line of defense against the commingling of hazardous and medical waste.

Fourth, both Congress and the State Legislature expressly recognized that guaranteed waste streams are crucial to the success of state-of-the-art resource recovery facilities. *See* H.R. Rep. No. 94-1491 at 34. Flow control regulations provide the investment security for such necessary projects. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187, 1190 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*,

742 F.2d 949 (1984), *cert. denied*, 471 U.S. 1004 (1985). By ensuring a steady, long-term supply of garbage, flow control provisions provide a broad financial base for revenue bonds. Such a secure, long-term foundation makes the solid waste facility an attractive investment. Absent flow control, waste-flight will disrupt and destroy the formation of a secure financial base, and revenue bonds will not be marketable. *See Central Iowa Refuse Systems*, 715 F.2d 419, 422-27; *Hybud*, 654 F.2d at 1190.[10]

In a similar manner, by guaranteeing a waste stream and stabilizing a market, flow control fosters the development of innovative recycling, composting, and energy-recovery technologies. This encouragement of new technologies was clearly contemplated by Congress when it enacted RCRA. H.R. Rep. 94-1491 at 34; *see also* 40 C.F.R. §§ 256.30, 256.31. For example, flow control can assist New York City in developing cutting-edge technology for large-scale composting of food wastes. The inability to utilize flow control will inhibit the development of new technologies and programs as well as the construction of environmentally-sound solid waste management facilities. *See Agenda for Action* at 14.

Fifth, separate and apart from providing the financial base for solid waste management facilities, flow control also ensures that garbage is actually shipped to and disposed of at environmentally-sound facilities. As recognized by Congress and the State Legislature, such facilities are essential if localities are to effectively address the garbage crisis. Flow control helps towns to guarantee that garbage is disposed of at an authorized

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[10] In New York, $2 billion in revenue bonds have been issued over the past ten years to finance solid waste management projects. In localities with flow control, approximately $1 billion in revenue bonds are currently outstanding. Any displacement of flow control could undermine such bonds, threaten bondholders' investments, and trigger litigation rivaling the "WPPSS" saga. *See generally In re Washington Public Power Supply System*, 720 F. Supp. 1379 (D. Ariz 1989), *aff'd*, 955 F.2d 1268 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 408 (1992).

facility even if flow control is not needed to finance the facility.

Sixth, flow control helps states and localities avoid financial exposure. Under *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992), a municipality may be liable for CERCLA clean-up costs incurred at disposal sites where its waste was dumped. *See* 42 U.S.C. § 9601 *et seq*. By directing municipal solid waste to a specific environmentally-sound disposal facility, localities can avoid or minimize such liability. *Northside Sanitary Landfill v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990) (city may concentrate its garbage at a single site given concern about clean-up costs at another site).

Seventh, in the context of transfer stations, flow control can reduce the volume of truck traffic as well as the volume of garbage transported to another facility. Transfer stations reduce waste volume by removing recyclables and then compacting the residue for shipment. Also, by consolidating the contents of several collection trucks for shipment in one larger truck, transfer stations reduce truck traffic. Mulvey, "Cost Guidelines for the Recycling Option," *printed in Selected Papers from the 1989 Conference on Solid Waste Management and Materials Policy* (New York State Legislative Commission on Solid Waste Management, 1989); *Filiberto Sanitation, Inc. v. State of New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 920 (3rd Cir. 1988).

Eighth, by providing municipalities an opportunity to obtain an accurate characterization of their waste streams, flow control provides an indispensable tool for developing a viable, comprehensive solid waste management plan. *Filiberto Sanitation*, 857 F.2d at 920. According to the EPA, the identification of the waste stream's components and volume is an indispensable first step towards solving the problems associated with garbage generation and disposal. Office of Solid Waste, U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992*

Update ES-1 (1992). Similarly, New York statutes require local solid waste management plans to contain, first and foremost, a "characteriz[ation of] the solid waste stream." ECL § 27-0107(1)(b)(i); *accord* ECL § 27-0405(2)(a).

For these reasons, flow control promotes many compelling local, state, and national interests.

D. THE CLARKSTOWN TRANSFER STATION PROTECTS THE COMMUNITY'S HEALTH AND ENVIRONMENT

1. The Clarkstown Landfill

The Clarkstown landfill opened in 1950. In 1980 DEC determined that the landfill constituted a "significant threat to the public health [and] the environment." R. 181, 202-03. Garbage was placed directly into the groundwater, and leachate was seeping into the groundwater and threatening the drinking water. R. 175-76. Therefore, DEC ordered the Town to close the landfill, listed it in the Registry of Inactive Hazardous Waste Disposal Sites, and assessed significant penalties. R. 189, 203. As a result of DEC's enforcement action, the Town agreed to construct a state-of-the-art transfer station that ultimately would form part of a county-wide solid waste management program. A private contractor, Recycling Center Inc. ("RCI"), constructed and operates the transfer station, charging $81 per ton of trash.[11] While petitioners complain about the Town's tipping fee, the difference in operations between their facility and Clarkstown's more than justifies the 15% differential.

2. Clarkstown's Transfer Station & Petitioners' Facility

Petitioners' characterization of the "simpl[e] transfer station," Pet. Br. at 13, masks the complexity of the Clarkstown facility. To gain access, each truck must first pass between two

[11] The Town has an option to purchase the station in 1995.

geiger counters to ensure no radioactive waste is present. Next, a Town employee examines the truck's manifest and weighs the truck. Video cameras record each entry. The transfer station itself is a huge three-story building, with a large bay area inside on the second floor where the solid waste is deposited. Here, Town and RCI employees visually check the waste for the presence of recyclables, hazardous waste, and medical waste. A roof and walls surround the transfer bay and contain blowing litter and unpleasant odors. Workers and machines then segregate recyclable materials such as tires, wood, cardboard, metal, branches, and yard clippings. The tires, metal, and cardboard are shipped to recycling centers. The Town pulverizes the wood and yard clippings and deposits the residue in the Town's compost field, located next door. After the recyclables are separated, machines load the non-recyclable residue into tractor-trailer dump trucks waiting below on the first floor or compress it for other trucks. The tipping fee charged by the Clarkstown facility reflects the cost of the environmentally-sound practices employed at a state-of-the-art facility.

In contrast, petitioners' site has no perimeter fence, no enclosed dumping bay, no enclosed loading area, and no radioactive waste sensors. Also, petitioners' recycling claims ring hollow in light of the police investigation that revealed that petitioners send recyclable material, such as steel rims and truck springs, to landfills and incinerators. R. 50, J.A. 17. Moreover, it appears that petitioners improperly mixed medical waste, including surgical gloves and intravenous feeding bags, with the solid waste. J.A. 17. While petitioners assert that they deal only in non-Clarkstown or non-New York State waste, the police officers' identification of Clarkstown waste at the site of the March 8, 1991 highway accident belies that claim. R. 55-6. Given these practices, it is no surprise that petitioners wish to avoid the inspection regimen of the Clarkstown facility.

ARGUMENT

FLOW CONTROL PROVIDES SUBSTANTIAL LOCAL BENEFITS WITHOUT RESTRICTING INTERSTATE COMMERCE

A. The Purpose of the Commerce Clause

The dormant Commerce Clause acts as a limitation on the states' authority to erect protectionist state barriers that would threaten the operation of the federal union. The Commerce Clause has been construed to preserve our "national solidarity" by preventing states from isolating themselves from problems common to all and fomenting "rivalries and reprisals" similar to those that existed under the short-lived Articles of Confederation. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); *West v. Kansas Natural Gas*, 221 U.S. 229 (1911). This grant of general power upon Congress to regulate commerce, however, did not preempt the states' police powers. "[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 350 (1977); *Parker v. Brown*, 317 U.S. 341, 360-61 (1943). Although petitioners apparently view the Commerce Clause as a constitutional antitrust provision, its focus instead is the protection of interstate markets, not particular interstate companies, from unduly burdensome regulations. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978).

B. Standard Of Review

This Court has developed two standards of review in analyzing Commerce Clause issues. First, economically protectionist regulations, that is, those regulations that discriminate against interstate commerce in favor of in-state interests, are subject to strict scrutiny. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Philadelphia v. New Jersey*, 437

U.S. 617, 624 (1978). A court may find that a state law constitutes "economic protectionism" (1) if the statute differentiates between in-state and out-of-state interests by favoring the former or burdening the latter or (2) if the statute was motivated by a discriminatory purpose. The inquiry into whether or not a discriminatory purpose motivated the statute usually centers on the legislative history behind the enactment. *See Washington Apple*, 432 U.S. 333, 352; *Clover Leaf Creamery*, 449 U.S. at 471, n. 15; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-71 (1984). While in practice, the strict scrutiny standard results in a virtual *per se* rule of invalidity, "[a]s long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (citation omitted).

Second, in contrast to protectionist regulations, "evenhanded" regulations, that is, those regulations that apply equally to in-state and out-of-state interests, are subject to a balancing test outlined in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* standard, an "evenhanded" state regulation is valid even if it effects an incidental burden on interstate commerce so long as that burden is not clearly excessive in relation to the local benefits. The examination of "incidental burdens on interstate commerce" is a comparative standard, and focuses on the degree to which a state action burdens interstate commerce relative to intrastate commerce. *Clover Leaf Creamery*, 449 U.S. at 471-72; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). Where the burden on out-of-state interests is no different from that placed on similar in-state interests, there is no burden on *interstate* commerce; rather, there is only a constitutionally unobjectionable burden on all commerce. Thus, evenhanded legislation will normally be upheld.[12]

[12] Only in rare instances, such as in *Pike* itself, where there are *both* substantial costs imposed on out-of-state interests and *de minimus* local benefits, will evenhanded regulations be struck down.

C. The Strict Scrutiny Test Is Inapplicable

In contrast to their position below where they urged the trial Court to apply the *Pike* balancing test, petitioners now strenuously argue that the strict scrutiny standard should apply. Pet. App. 19a. The strict scrutiny test has no application here. To begin with, the Ordinance is facially neutral. The Ordinance applies to "all solid waste within or generated within the Town." To that end, "*[a]ll* solid waste . . . shall be removed, transported and/or disposed of only by carters licensed [by the Town]" and *any* and *all* solid waste, regardless of origin, is to be transported and delivered to the Town's transfer station. Pet. App. 50a-53a (emphasis added). Moreover, the Town has established a single, uniform tipping fee for each ton of solid waste brought to the transfer station, regardless of its origin. Thus, the Ordinance "visits its effects on both interstate and local business." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

Even if the Ordinance is perceived as burdening the interstate flow of solid waste, it is clear that the Ordinance similarly burdens Clarkstown garbage. The Ordinance's equal treatment of interstate and local solid waste defeats application of the strict scrutiny standard. In each decision applying that standard the Court has been confronted by a statute that imposed an export or import ban on a certain good, while permitting the continuation of in-state trade in that good. *Philadelphia v. New Jersey*, 437 U.S. 617 (law precluded out-of-state trash from being disposed of in New Jersey, but did not similarly restrict disposal of New Jersey trash); *Fort Gratiot*, — U.S. —, 112 S.Ct. 2019 (same effect); *Chemical Waste Mgmt. Inc. v. Hunt*, — U.S. —, 112 S.Ct. 2009 (1992) (law established higher tipping fee for out-of-state-solid waste but did not so burden in-state waste); *Baldwin*, 294 U.S. 511 (statute barred retail sale of Vermont- produced milk in New York); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (law precluded export of Oklahoma minnows for sale, but allowed in-state sales). It is discrimination against the *inter*state movement of goods, while favor-

ing or failing to burden the *intra*state movement of goods, that triggers the strict scrutiny standard. This point was made most clearly in *Philadelphia v. New Jersey* where the Court stated that while New Jersey could not stem the depletion of landfill capacity by blocking the disposal of only out-of-state trash, it could pursue that goal without violating the Commerce Clause by slowing the flow of all waste, both in-state and out-of-state, into its landfills, even though such a strategy would impede the flow of out-of-state waste across its border. 437 U.S. at 626.

Unlike the situations in *Washington Apple*, 432 U.S. at 352, or *Bacchus*, 468 U.S. at 269-71, there is no evidence of discriminatory purpose behind the Ordinance. Here, the Town Board arranged for the facility's construction and adopted the Ordinance only after DEC determined that the landfill constituted a danger and ordered it closed. The purpose of the Ordinance was to ensure the delivery of all solid waste to the transfer station so as "to benefit the health, welfare, and safety of the town residents." Pet. App. 50a. These articulated purposes deserve deference, *see Clover Leaf Creamery*, 449 U.S. at 463 n. 7, 471 n. 15, and include promoting New York State's public policy of reducing solid waste volume, increasing resource recovery and recycling, and ensuring safe and reliable handling of solid waste. Even if the Ordinance primarily burdened interstate companies, which it does not, that fact "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce." *Exxon*, 437 U.S. at 125. Discrimination simply is not present.[13] Far from protecting the Town residents' economic interests, the Ordinance works to the residents' economic disadvantage since the same $81 tipping fee that applies to out-of-state haulers also applies to all in-state haulers that come to the facility. Given this equal treatment, it cannot be said that Clark-

[13] The Clarkstown facility ships non-recyclable solid waste to many of the same sites to which petitioners shipped waste. Accordingly, petitioners' suggestion, Pet. Br. at 34-5, that the Clarkstown facility "obstruct[s] the use of solid waste as a source of energy" is disingenuous.

stown is imposing the "full burden" of supporting the transfer facility upon out-of-state interests. *Philadelphia v. New Jersey*, 437 U.S. at 628. Restrictions on out-of-state interests are permissible so long as they are evenly applied to in-state interests. "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state." *Sporhase v. Nebraska*, 458 U.S. 941, 955-56 (1982). Here, "[t]he existence of major in-state interests adversely affected by the [law] is a powerful safeguard against legislative abuse" and justifies the application of the balancing test. *Clover Leaf Creamery*, 449 U.S. at 473 n. 17; *South Carolina State Highway Dept. v. Barnwell Bros. Inc.*, 303 U.S. 177, 187 (1938); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981); *Fort Gratiot*, 112 S.Ct. at 2029 (Rehnquist, C.J., and Blackmun, J., dissenting).

D. Under the *Pike* Balancing Standard, the Ordinance Is Valid

This Court has applied a balancing test to several evenhanded regulations, like the Clarkstown Ordinance, that do not differentiate between in-state and out-of-state interests. In *Clover Leaf Creamery*, the Court applied the balancing test and upheld a statute that prohibited all retailers from selling milk in plastic, non-returnable cartons. Although the statute did burden out-of-state plastic manufacturers, "this burden [was] not 'clearly excessive' in light of the substantial state interests in promoting conservation of energy and other natural resources and easing solid waste problems." 449 U.S. at 473; *see Huron Portland Cement*, 362 U.S. at 448 (burden did not outweigh benefits of evenhanded smoke abatement ordinance).

In a Commerce Clause challenge against a similar flow control law, the Third Circuit Court of Appeals applied the *Pike* test and upheld the statute. *Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 919-

22 & n.1 (3d Cir. 1988). The regulation in *Filiberto Sanitation* provided several benefits including ensuring the proper disposal of all trash, reducing truck traffic, providing accurate data for planning purposes, facilitating long- and short-term contracts for final disposal, and discouraging illegal dumping by directing garbage to prescribed sites. The county transfer station charged $100 per ton. Filiberto claimed it charged $50 per ton. *Id.* at 916.

Recognizing that legitimate health and safety regulations may unavoidably effect an incidental burden on interstate commerce, *id.* at 918-19 (citing cases), the Third Circuit focused on whether the regulation saddled out-of-state interests with the burden of the solution to New Jersey's solid waste problem. The court held that the regulation did not constitute economic protectionism because: it applied equally to in-state and out-of-state interests, *id.* at 921; no discriminatory purpose was identified, *id.* at 920-21; and the garbage continued to flow into interstate commerce. Accordingly, the court declined to apply the heightened scrutiny standard and instead applied the balancing test. Finding no burden that discriminated against interstate commerce and the existence of compelling local benefits, the Third Circuit rejected the Commerce Clause challenge. *Id.* at 922.

The Sixth Circuit Court of Appeals has also upheld an ordinance directing that all trash be delivered to a waste-to-energy plant. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187 (6th Cir. 1981). The Sixth Circuit balanced the parties' claims. Since the ordinance was a legitimate exercise of the police power and its burden "f[e]ll hardest" on Akron residents and interests, it did not constitute a discriminatory burden on out-of-state interests and did not violate the Commerce Clause. 654 F.2d at 1194-95; *see also In re Waste Disposal Agreement*, 237 N.J. Super. 516, 568 A.2d 547 (N.J. Super. 1990); *In re Fiorillo Bros.*, 242 N.J. Super. 667, 577 A.2d 1316 (N.J. Super. 1990); *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1379-1381 (D. Del. 1985).

Like fire and police protection, the control of local sanitation—including garbage collection and disposal—remains a paradigmatic example of the exercise of municipal responsibility and power. *California Reduction Corp.*, 199 U.S. 306; *Gardner v. Michigan*, 199 U.S. 325. As the Second Department correctly noted below, "[l]ocal governments have long been authorized to enact laws relating to the 'safety, health, and well-being of persons or property' (N.Y. Const., Art. IX, § 2 [c][10]), and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments, is fundamentally related to the public health and welfare." Pet. App. 9a (citations omitted).

Police power ordinances, such as Clarkstown's, have a strong presumption of validity. As this Court stated in *California Reduction*, "[e]very intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety." 199 U.S. at 319. This is so because states retain the authority to regulate matters of state and local concern on which Congress has not spoken. *See Parker v. Brown*, 317 U.S. at 360-363. Given the hazards associated with garbage and its negative economic value, *see Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 253 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), and their traditional responsibility for garbage disposal, states and localities have, and must continue to have, the power to direct garbage to facilities that can safely dispose of it. As the Appellate Division recognized below, the focus of such police power regulation is "public welfare, rather than profit." Pet. App. 10a. "Where Congress has not acted, a state's own health and safety-oriented trash disposal regulation violates no federal constitutional precepts, provided it neither unduly protects its own citizens nor discriminates against another state's citizens." *In re Waste Agreement*, 568 A.2d at 555; *Parker v. Brown*, 317 U.S. at 367. Moreover, where such regulations are consistent with overall Congressional legislation, as in the present case, they should receive greater deference.